U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 15May2001

CASE NO.: 2000-LHC-1943

OWCP NO.: 1-149259

IN THE MATTER OF:

WAYNE L. CROWLEY
Claimant

v.

GIBBS & COX, INC.
Employer

and

TRAVELLERS INSURANCE CO.
Carrier

APPEARANCES:

James W. Case, Esq.
For the Claimant

Edward W. Murphy, Jr., Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 27, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administration Law Judge, CX for a Claimant's exhibit and RX for an exhibit offered by the Employer/Carrier ("Respondents"). This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. Claimant filed a claim for compensation on or about March 14, 2000 and the Employer filed a notice of controversion on or about April 17, 2000.

2. The parties attended an informal conference on April 13, 2000.

3. The applicable average weekly wage is $915.00.

4. The Claimant seeks temporary total compensation from October 1, 1999 through the present and continuing.

The unresolved issues in this proceeding are:

1. Whether Claimant has satisfied the jurisdictional requirements of the Act.

2. If so, whether his alleged pulmonary injury is causally related to his maritime employment.

3. Whether Claimant gave timely notice of his alleged work-related injury.

4. If so, whether he timely filed for benefits therefor.

5. The nature and extent of his disability.

6. Entitlement to penalties and interest on past due compensation benefits.

7. Entitlement to an award of medical benefits and an attorney's fee and reimbursement of litigation expenses.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
RX 48A	Attorney Murphy's letter filing the **Curriculum Vitae** of Richard Robert Riker, M.D.	02/08/01
RX 48		02/08/01

RX 49	Dr. Riker's bill to Respondents' counsel	02/08/01
RX 50	Dr. Riker's report	02/08/01
RX 51	January 12, 2001 Deposition Testimony of Dr. Riker	02/08/01
CX 17 02/16/01	Attorney Case's letter moving that the record be closed as the Employer has not complied with the post-hearing schedule for the filing of the Employer's Labor Market Survey	
RX 51A	Attorney Murphy's February 16, 2001 filing on February 20, 2001 the following evidence on behalf of the Employer[1]	rejected
RX 51B rejected	January 17, 2001 Labor Market Survey of Kathleen Tolman, CDMS, CCM	
RX 52 rejected	Ms. Tolman's January 25, 2001 letter to Attorney Case	
RX 53 rejected	Ms. Tolman's January 26, 2001 letter to Attorney Case	
RX 54 rejected	Ms. Tolman's January 26, 2001 letter to Attorney Case	
RX 55 rejected	Notice relating to the Taking of the Deposition of Ms. Tolman	
RX 57A	Attorney Murphy's letter	

[1]RX 51B - RX 55 are rejected as the Employer has failed to comply with the post-hearing schedule established at the hearing. The Employer also failed to comply with the pre-hearing timetable established in the Notice of Hearing. (ALJ EX 1) In this regard, **see William v. Marine Terminals**, 14 BRBS 728 (1981).

rejected		
	filing the	
RX 57	February 12, 2001 Labor Market Survey of Ms. Tolman	rejected
CX 18	Attorney Case's letter filing the	02/28/01
CX 19 02/28/01	February 9, 2000 letter from the CNA Insurance Companies[2]	
CX 20 02/28/01	Attorney Case's Fee Petition	
RX 57A	Attorney Murphy's brief on the Section 13 issue presented herein	02/28/01
RX 58	Attorney Murphy' letter relating to Attorney Case's Fee Petition	03/02/01

The record was closed on March 2, 2001, as no further documents were filed.

Summary of the Evidence

Wayne L. Crowley ("Claimant" herein), sixty-five (65) years of age and with an employment history of manual labor, has worked since August of 1992 for Gibbs & Cox, Inc. ("Employer"), a Maine engineering firm that provides certain services to the Bath Iron Works Corporation (BIW), a maritime employer that builds vessels for the U.S. Navy at its shipyard in Bath, Maine adjacent to the navigable waters of the Kennebec River. Claimant, a 1957 graduate of the Maine Maritime Academy with a degree in marine engineering, then served in the Merchant Marines for approximately six (6) years. He has worked in the Risk Engineering Department at Travellers Insurance for twenty (20) years and he has also worked at the Groton, Connecticut shipyard of the Electric Boat Company as a test engineer in its Ship Testing Organization for about eleven (11) years. He then went to work for the Employer for the second time on August 10,

[2]This exhibit is admitted because it is dated February 9, 2000 and the record was closed on February 16, 2001. While RX 51B is dated February 16, 2001, it was not filed until February 20, 2001. RX 52-RX 54 provide very little substantive information about these alleged jobs.

1992 at the shipyard of the Bath Iron Works Corporation, Claimant remarking he has worked at that shipyard for almost fifteen (15) years. (TR 19-24; RX 1)

Claimant described the Employer as Naval Marine Engineers or Naval Architects and as a division of Bath Iron Works Corporation. The Employer "was the original designer of the DDT-51 class type frigate," but in Bath, the division there is direct support of changes for the original design and worked as a subcontractor to Bath Iron Works on a basic order agreement, primarily "on board now to help manage the changes, revisions in that construction project." Claimant worked closely with the designers and engineers at the BIW as he was responsible for twelve (12) operation systems on those combat ships, Claimant remarking, "Every system that (he) had, (he) had a counterpart BIW engineer that (he) worked with." He frequently had to go on board the ships under construction or repair to discuss with the other engineers and trade workers any design changes or revisions and then he would board the ships to coordinate and implement the design changes or revisions. He also has performed his assigned duties in several buildings at the shipyard adjacent to the navigable waters of the Kennebec River. (TR 25-31, 46-51)

In 1996 Claimant was assigned to work as a member of the technical-mechanical management group in the so-called North Stores office in an environment that "was pretty unbearable" because of the "(v)ery dusty" atmosphere produced by the "air and dust particles" generated by the engineers and other employees working on the piping, electrical and other operating systems. The environment was also filled with a "lot of fumes" produced by the gas turbines of a ship docked just adjacent to the building, fumes that caused Claimant's eyes to "smart" and him to "cough a lot." According to Claimant, "Oh, everybody complained" but Bill Menzie, the Employer's Vice-President, replied to Claimant's complaint about the work environment, "It's a BIW building, and there's not much we can do about it... we're all living with it, that's about all we can do." Claimant was also daily exposed to welding fumes, grinding dust, paint fumes and other such exposures produced by "the normal type" of work performed in the building or repair of the ships whenever he went on board the ships, Claimant remarking that "no one stops working when you go aboard the ship." While he wore safety glasses and hearing "plugs" when he boarded the ships, he used no face mask or respirator. (TR 32-37, 52-59)

Claimant went to see Dr. Stephen Nimbargi, his family doctor, on March 18, 1999 for respiratory problems and the doctor diagnosed "acute bronchitis" and prescribed medication therefor. (CX 9 at 84) That was Claimant's first visit to a doctor for his breathing problems. However, the symptoms of

fatigue, wheezing, chest pain, laryngitis and dizziness continued and Claimant was referred to Dr. Frank Altman, a pulmonary specialist, and Claimant saw the doctor initially on May 10, 1999. (CX 1 at 1) Dr. Altman performed various diagnostic tests and the doctor's records relating to the evaluation, diagnosis and treatment of Claimant's pulmonary problems are in evidence as CX 1 at 1-21 between May 10, 1999 and January 3, 2000. In July of 1999 Dr. Altman recommended a trial return to work to test Claimant's response to the workplace environment and Claimant, who now was Manager of Engineering for the Employer, returned to work for one week but, as he "was having a real tough go," he called the doctor the next week and the doctor increased his prednisone level to improve his breathing. Claimant then "could function pretty good" but there were days when he "got real tired" and "had problems." Dr. Altman was concerned about the high dose level of prednisone he had prescribed for the Claimant and the doctor then suggested that he had "to get out of the environment" as he "was having a pretty tough go of it." Claimant then "discussed (the situation) with (his) wife, discussed (it) with the doctors, and that's when (he) wrote (his) letter of resignation to terminate on the first of October" based on the medical advice he had received from Dr. Altman and Dr. Nimbargi. He has not returned to work since October 1, 1999 and he is still being treated by Dr. Nimbargi and the pulmonary group with which Dr. Altman was previously associated. (TR 37-43, 59-64)

Claimant has been prescribed several medications and he daily experiences symptoms such as hoarseness, shortness of breath, especially in the morning, coughing spells, Claimant remarking that very hot days and high humidity bother him and that he has his good days and bad days, depending upon the atmosphere of the environment in which he finds himself. Claimant has been unable to return to work for the Employer and he is unable to work full-time on a regular basis because he tires easily and because of his shortness of breath and coughing spells. (TR 43-46, 65-83)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741

(5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between

work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33

U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's credible statements to establish that he experienced a work-related harm, and as it is undisputed that working conditions existed which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes

out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most

significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his combined obstructive (emphysema) and restrictive pulmonary fibrosis (CX 1 at 4) or adult onset asthma (CX 1 at 14), resulted from his exposure to and inhalation of injurious pulmonary stimuli while working for the Employer at the shipyard of the Bath Iron Works Corporation. The Employer has introduced evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence. However, I first must determine whether the Act applies herein.

Coverage

Generally, an employee is covered by the Act if he meets two tests: the status test and the situs test. **See generally Northeast Marine Terminal Co. v. Caputo**, 432 U.S. 249 (1977). An employee who would have been covered under the pre-amendment Act, **i.e.**, who was injured over water, is covered by the amended Act, without reference

to the status test. **See Director v. Perini North River Associates**, 459 U.S. 297, 103 S.Ct. 634 (1983). Claimant was not injured over water, and therefore must meet both the status test and the situs test.

Board and federal case law has established that new ship construction on land-based building ways and similar structures is work on a "dry dock" pursuant to Section 3(a) of the pre-1972 amended Act. **Simpson v. Director, OWCP**, 681 F.2d 81 (1st Cir. 1982), **cert. denied**, 459 U.S. 1127 (1983); **Port of Houston Iron Works v. Calbeck**, 227 F. Supp 966 (S.D. Tex. 1964); **Murphy v. Bethlehem Steel Corp.**, 17 BRBS 148 (1985); **Paul v. General Dynamics Corp.**, 16 BRBS 290 (1984). **See generally Calbeck v. Travelers Insurance Co.**, 370 U.S. 114 (1962).

The situs test refers to the place at which the employee worked or was injured. Covered locations include navigable waters and adjoining areas used to load, unload, repair or build a vessel. **See** Section 2(4) of the Act. Claimant's most recent employment for the Employer occurred in the main shipyard of the Bath Iron Works Corporation, a maritime facility which adjoins navigable wagers and which is used for ship building and repair. I note that this shipyard has been held to be a maritime facility in a plethora of decision by the Benefits Review Board and by the U.S. Court of Appeals for the First Circuit. Claimant therefore meets the situs test based upon this employment.

The status test refers to the employee's occupation. Covered occupations include longshoremen, harbor-workers, ship repairers and shipbuilders. **See** Section 2(3) of the Act. Claimant's coverage by the Act during his most recent employment as a maritime engineer is subject to considerable controversy. The general rule is that employees are covered if their duties are an "integral part" of traditional longshoring and shipbuilding or ship repairing processes. The Supreme Court has concluded that, at a minimum, clerical workers are not covered by the Act. The Court explained the Congressional intent was to cover those workers engaged in the essential elements of unloading a vessel, taking cargo out of a hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo. **Northeast Marine Terminal Co. v. Caputo**, 434 U.S. 249, 266-67 (1977). The **Caputo** Court relied upon the following passage from the legislative history:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees

> whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in loading and unloading functions are covered by the new amendment. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13, 1972 U.S. Code Cong & Admin. News 4708.

Claimant's duties as a marine engineer establish coverage by the Act. His clerical duties were minimal, not even mentioned in his testimony, and his duties in making, implementing and supervising the design changes on the DDT-51 class type frigates are an integral part of the shipbuilding industry and, in my judgment, constitute a most important part of the shipbuilding process because his failure to perform his duties properly could result in a tragedy and disaster for the service people serving on those frigates. In fact, I am quite surprised that the Employer has challenged jurisdiction herein faced with the plethora of case precedents on this issue. **See, e.g., Fleischman v. Director, OWCP**, 32 BRBS 28 (CRT)(2d Cir. 1998); **Eckhoff v. Dog River Marina**, 28 BRBS 51 (1994). I therefore conclude that Claimant was a maritime employee covered by the Act.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine**

Industries Northwest, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In the case at bar the Respondents dispute that Claimant’s pulmonary/respiratory problems are causally related to his work and, in support of their position, have offered the December 12, 2000 report of Dr. Richard Robert Riker (RX 50), as well as the doctor’s deposition testimony on January 12, 2001. (RX 51)

In his report Dr. Riker states that Claimant’s pulmonary function tests reflect a “mildly impaired/Class 2/10-25% impairment of the whole person based on his pulmonary disease,” that he agrees with Dr. Altman that claimant’s respiratory impairment “is more a manifestation of his asbestos-associated interstitial lung disease and his cigarette-associated emphysema than reactive airways disease,” that Claimant’s disability is impacted by his lumbosacral degenerative disc disease, carpal tunnel syndrome and a hearing loss and that Claimant does not meet the medical criteria for occupational asthma. (RX 50)

The parties deposed Dr. Riker at his January 12, 2001 deposition (RX 51)[3] and Dr. Riker reiterated his opinions that Claimant's pulmonary/respiratory problems are not causally related to his employment with the Employer based upon his review of the medical records that he itemized in his December 27, 2000 letter to Mr. Murphy (RX 49), as well as his examination of the Claimant on November 20, 2000, that Claimant's "pulmonary process is most likely either an asthmatic bronchitis or a post-infectious bronchitis and by those terms (the doctor meant) ongoing airways irritability and inflammation after an infection," that the doctor had "no evidence to support (the) contention" of causality to Claimant's work for the Employer because "the symptoms that he had were much more consistent with an infection," that Claimant's respiratory and pulmonary condition was neither aggravated nor accelerated by his employment with the Employer, that any impairment he experiences is "mild" and "that he (should) avoid strong fumes and smoke and perfumes and potpourri" whenever he has "another upper respiratory tract infection and his airways again become hyperreactive." (RX 51 at 3-20)

Dr. Riker further opined that Claimant "has clearly shown us an ability to perform exertional type activities," that he could return to work at BIW's Church Road facility because "he had nothing in the way of symptoms (while working there) and it was only when he was at the North Stores facility that he developed any of these symptoms," that he could work as longshoreman unloading ships, carrying heavy packages and walking up and down stairs. **However, Dr. Riker was unable to render an opinion on Claimant's prognosis because "were he to develop another infection it's very likely that his airways would again become reactive."** (**Id.** at 20-22) (Emphasis added)

In response to intense cross-examination by Claimant's attorney, Dr. Riker admitted that asthmatic bronchitis or post-infectious bronchitis implies bronchial constriction, that such condition is also a component of what is referred to as occupational asthma, that occupational asthma can result from a variety of exposures in the workplace, that a trial return to work in the prior workplace may or may not confirm a diagnosis of occupational asthma if the condition is worsened, that if the agent or substance precipitating the response is specific to the workplace, that response would be an occupational-related illness, especially "if one were able to confirm with objective testing that there was a worsening of the symptoms with that

[3]Objections made by counsel at the deposition are overruled as the questions and answers are relevant and material in this administrative hearing and as the objections really go to the weight to be accorded to those opinions.

exposure," that Dr. Altman recommended in the summer of 1999 that Claimant should no longer work at the shipyard because workplace exposures there were causing pulmonary problems and that he (Dr. Riker) "might have requested that Mr. Crowley continue his work activities in a different local (sic) where he may not have been exposed to the type of nonspecific things such as perfumes or potpourri or diesel fumes that may precipitate his asthma until his asthmatic condition had again improved." (TR 22-31)

Dr. Riker further admitted that "if there was no way to avoid the substance or situation that precipitated (the) problems, that (**i.e.,** removal from the workplace) would be a reasonable course of action," that this was only his third deposition because he tries to "avoid dealing with lawyers," that he agreed to examine Claimant as a personal favor to Dr. Paul Cox, the original doctor asked by Attorney Murphy but who was unavailable to perform the examination, that Claimant's pulmonary/respiratory condition had deteriorated in the summer of 1999, the doctor refusing to admit that the deterioration resulted from his workplace exposures and the doctor flippantly remarking: **I don't know. It may have been that it resulted from fires at his hunting lodge obtained at the same time.**[4] (Emphasis added) (**Id.** at 31-38)

Dr. Riker further opined that Claimant's interstitial lung disease is not causally related to his work for the Employer, that it could be "idiopathic pulmonary fibrosis, a condition that has no cause that we know of, hence the word idiopathic," but it could also be due to past asbestos exposure and that Claimant's emphysema is due solely to his cigarette smoking. (**Id.** at 38-40)

On the other hand, Claimant has offered the medical reports of Dr. Frank Altman, a noted pulmonary specialist, and the doctor, as of June 14, 1999, opined that Claimant's pulmonary/respiratory problems are due to a combined obstructive (emphysema) and restrictive (pulmonary fibrosis) disease. (CX 1 at 4) As noted, Dr. Altman recommended a trial return to work on July 1, 1999 "to see if the workplace continues to bother his breathing" (**Id.** at 5) and, as of July 27, 1999, the doctor reported that the trial return to work had resulted in increased shortness of breath, a worsening cough, dizziness and an inability to sleep because of his shortness of breath." Dr. Altman continued to see Claimant as needed and, as of September

[4]I use the word "flippantly" because there is absolutely no evidence of any fire or other exposures at a hunting lodge. Apparently the doctor is not only upset with lawyers but also does not relish intense cross-examination of his opinions.

9, 1999, the doctor recommended that Claimant stop working at the shipyard because "from these two trials it seemed clear that Mr. Crowley will be unable to return to work without taking very high dose prednisone," a regimen that "has unacceptable side-effects." According to the doctor, Claimant "has adult onset asthma which is severely exacerbated by the air at his workplace." (**Id.** at 13-14) **See also Id.** at 6-12, 15-21)

Dr. Altman reiterated his opinions at his October 10, 2000 (CX 5) deposition and his opinions on that causal relationship withstood cross-examination by Respondents' attorney. In this regard **see** CX 15 at 21-36, 38)

Dr. William A. Demicco, also a pulmonary specialist, examined Claimant on August 24, 2000 for evaluation of increasing shortness of breath and continued fatigue and the doctor, reporting that the "patient also has documented asthma with positive Methacholine Challenge," opined that the "patient's asthma seems well-controlled and (the) symptoms are more suggestive of emphysema." (CX 3 at 24)

Claimant has also been treated for various medical problems over the years by Dr. Andrew J. Keating (CX 5), by Dr. Robert H. Dixon (CX 4), by Dr. Myron K. Krueger (CX 6), by Dr. Riker (CX 11), Dr. R. Scott Schafer (CX 12) and Dr. Frank Sheldon (CX 13), and he has undergone a plethora of diagnostic tests at Bath Memorial Hospital (CX 2), at Mid Coast Hospital (CX 8), at Mercy Hospital (CX 7) and at Parkview Hospital. (CX 10)

On the basis of the totality of this closed record, I find and conclude that Claimant's mixed obstructive/restrictive disease and/or adult onset asthma constitute a work-related injury as that bodily harm directly resulted from his maritime exposure to injurious pulmonary stimuli while working for the Employer at the BIW shipyard. In so concluding, I have given greater weight to the medical evidence presented by the Claimant, especially the forthright opinions of Dr. Altman, as extensively summarized above, as I find the doctor's opinions to be well-reasoned, well-documented, most probative and most persuasive. Dr. Altman has been Claimant's treating pulmonary specialist since May 10, 1999 (CX 1 at 1) and, pursuant to **Pietrunti, supra**, and **Amos, supra**, I have given greater weight to the opinions of Dr. Altman and Dr. Demicco, who saw Claimant in the absence of Dr. Altman. (CX 3)

While Dr. Riker's opinion did rebut the statutory presumption in Claimant's favor, as noted above, the doctor's candid admissions, as summarized above, clearly support Claimant's essential thesis that his mixed obstructive/restrictive pulmonary disease was aggravated, in part, by his occupational exposures to the injurious pulmonary

stimuli at the BIW's shipyard, that he experienced further exacerbations during two trial returns to work and that he cannot return to work for the Employer at the BIW shipyard or any other workplace that would expose Claimant to further aggravations, and I so find and conclude, moreover, that Claimant might be exposed to diesel fumes, for example, not only at the BIW shipyard or while driving on the highway behind "a sixteen wheeler" is no defense to this claim because both Dr. Altman and Dr. Riker agree that removal from such workplace exposures is a reasonable course of action, and I so find and conclude. In this regard, **see Bath Iron Works Corp. v. Director, OWCP (Hutchins)**, 244 F.3d 222 (1st Cir. 2001).

Accordingly, I find and conclude that Claimant has established a work-related injury and that the date of injury is September 9, 1999, as further discussed in the next section.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

Respondents also defend the claim on the grounds (1) that Claimant has known of his breathing problems since at least April 19, 1986 based on his pulmonary function tests at that time (CX 2 at 22), (2) that he was treated for bronchitis on June 24, 1994 (CX 11 at 137) and (3) that he was treated for chest discomfort on April 1, 1997. (CX 12 at 144)

However, Claimant credibly testified that he did not learn of the causal relationship between his pulmonary problems and his work for the Employer until he was so advised by Dr. Altman on September 9, 1999, at which time the doctor recommended that Claimant stop working because the two trial returns to work had aggravated his condition. (CX 1 at 13) Prior treatment records do not contain such statement on the causation issue and I note that Dr. Riker, who now is Respondents' medical expert, saw Claimant on June 24, 1994 "for his cough" and evaluation of the possibility of a "sick building syndrome" (CX 11 at 137) and I note that the doctor concluded in his report as follows (Emphasis added) (CX 11 at 139):

> **It is very difficult, if not impossible, to answer the question regarding the potential environmental impact of the building in which he works.**

Claimant gave notice to the Employer by Form LS-203, dated March 14, 2000 (CX 16 at 226). Thus, Claimant gave timely notice to the Employer of his occupational disease, and I so find and conclude. Moreover, the Employer has had actual knowledge of Claimant's pulmonary problems since at least April 16, 1999 (CX 9 at 114) and the record does not reflect the filing of the Form LS-202, as required by Section 30 of the Act.

The U.S. Court of Appeals for the First Circuit has just issued a most significant decision in **Bath Iron Works Corporation v. Hutchins**, 244 F.3d 222 (CRT)(1st Cir. 2001), and this case is also support for my conclusion that the date of injury herein is September 9, 1999.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act

have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (19889). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

As noted above, Claimant’s occupational disease became manifest on or about September 9, 1999 and the claim for compensation, dated March 14, 2000 (CX 16), satisfies the requirements of Section 13(b)(2) of the Act, and I so find and conclude. As also noted, the record does not reflect the filing of the Form LS-202, as required by Section 30. Likewise, the decision in **Hutchins, supra**, is support for these conclusions. Attorney Murphy raises a novel theory relating to the tolling provisions of Section 30(f) but cites no precedent for such thesis. Thus, I reject that argument raised in RX 57A.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975).

Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a marine engineer or engineering manager. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not **timely** submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has not become permanent as he requires additional medical care and treatment and as his recovery to the

status quo ante has been delayed by the Respondents' failure to accept this claim. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the

Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total disability from October 1, 1999 to date and continuing. Moreover, the issue of permanency has not yet been considered by the District Director. (ALJ EX 2) **In this regard, see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978).

On the basis of the totality of the record, I find and conclude that Claimant has been permanently and totally disabled from October 1, 1999, according to the well-reasoned opinion of Dr. Altman and Dr. Nimbargi and when he was forced to discontinue working as a result of his occupational disease.

With reference to Claimant’s residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must

consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid at the time of his injury. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

As indicated above, the Respondents have untimely filed a Labor Market Survey (RX 51B - RX 54) in an attempt to show the availability of work for Claimant. I cannot accept the results of that survey because the Employer, without good cause and without requesting an extension of time and without filing a response to Claimant’s motion to close the record (CX 17), has failed to comply with the pre- and post- hearing deadlines established herein.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins**

v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert.**

denied, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant timely advised the Employer of his work-related injury on or about March 14, 2000 and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is

excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, the Employer and its Carrier are responsible for the reasonable, necessary and appropriate medical care in the evaluation, diagnosis and treatment of Claimant's occupational disease commencing on March 18, 1999, at which time he saw Dr. Nimbargi for his breathing problems. (CX 9 at 84)

Section 14(e)

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. **Universal Terminal and Stevedoring Corp. v. Parker**, 587 F.2d 608 (3d Cir. 1978); **Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in pert. part** and **rev'd on other grounds sub nom. Ingalls Shipbuilding v. Director**, 898 F.2d 1088 (5th Cir. 1990), **rehearing en banc denied**, 904 F.2d 705 (June 1, 1990) **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 900 F.2d 506, 23 BRBS 40, 51 (2d Cir. 1990); **Rucker v. Lawrence Mangum & Sons, Inc.**, 18 BRBS 76 (1987); **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 78 (1985); **Frisco v. Perini Corp.**, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a notice of controversion is filed or on the date of the informal conference, whichever is earlier. **National Steel & Shipbuilding Co. v. U.S. Department of Labor**, 606 F.2d 875 (9th Cir. 1979); **National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1978); **Spencer v. Baker Agricultural Company**, 16 BRBS 205 (1984); **Reynolds v. Marine Stevedoring Corporation**, 11 BRBS 801 (1980).

The Benefits Review Board has held that an employer's liability under Section 14(e) is not excused because the employer believed that the claim came under a state compensation act. **Jones v. Newport News Shipbuilding and Dry Dock Co.**, 5 BRBS 323 (1977), **aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Graham**, 573 F.2d 167 (4th Cir. 1978), **cert. denied**, 439 U.S. 979 (1978).

The Benefits Review Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." **Hite v. Dresser-Guiberson Pumping**, 22 BRBS 87, 92 (19989); **White v. Rock Creek Ginger Ale Company**, 17 BRBS 75, 79 (1985); **Rose v. George A. Fuller Company**, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring).

The Benefits Review Board has held that the Section 14(e) additional assessment is mandatory and cannot be waived by the Claimant. **Tezeno v. Consolidated Aluminum Corp.**, 13 BRBS 778, 783 (1981). Should the District Director's file reflect such filings on or about that time, the Respondents' obligation for this ten (10) percent additional compensation would, of course, terminate upon those filings.

As the form LS-207 was not filed, the Section 14(e) mandatory assessment terminates on April 13, 2000, the date of the informal conference.

Section 14(e) provides that if the employer fails to pay any installment of compensation voluntarily within fourteen (14) days after it becomes due, employer is liable for an additional ten (10) percent of such installment, unless it files a timely notice of controversion or the failure to pay is excused by the District Director. 33 U.S.C. §914(e). Section 14(b), as amended in 1984, provides that all compensation is "due" on the fourteenth day after the employer has been notified pursuant to Section 12 or the employer has knowledge of the injury. 33 U.S.C. §§912, 914(b) (Supp. IV 1986).

It is well-settled that the Section 14(e) additional assessment is mandatory and may not be waived by Claimant. **Tezeno v. Consolidated Aluminum**, 13 BRBS 778 (1981); **McNeil v. Prolerized New England Co.**, 11 BRBS 576 (1979); **Harris v. Marine Terminals Corp.**, 8 BRBS 712 (1978); **Nulty v. Halter Marine Fabricators, Inc.**, 1 BRBS 437 (1975). It is also well-settled that compensation becomes due fourteen (14) days after the employer has knowledge of its employee's injury or death, and not until such time as the claim is filed. **Pilkington v. Sun Shipbuilding & Dry Dock Company**, 9 BRBS 473 (1978). The Employer has consistently treated pulmonary problems as non-industrial (CX 16 at 231) and took no action until on or about April 20, 2000. (CX 16 at 230) Thus, Section 14(e) applies herein on those installments due between October 1, 1999 and April 13, 2000, the date of the informal conference or the filing date of the form LS-207, whichever is earlier.

Responsible Employer

The Employer and its Carrier ("Respondents") are responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989). **See also Bath Iron Works Corporation v. Director, OWCP (Hutchins)**, 244 F.3d 222 (1st Cir. 2001).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Respondents. Claimant's attorney filed a fee application on February 28, 2001 (CX 20), concerning services rendered and costs incurred in representing Claimant between April 13, 2000 and February 23, 2001. Attorney James W. Case seeks a fee of $11,736.22 (including expenses) based on 48.30 hours of attorney time at $195.00 per hour and 23.50 hours of paralegal time at $55.00 and $65.00 per hour.

The Employer has accepted the requested attorney's fee as reasonable in view of the benefits obtained and the hourly rates charged. (RX 58)

In accordance with established practice, I will consider only those services rendered and costs incurred after April 13, 2000, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Respondents' comments on the requested fee, I find a legal fee of $11,736.22 (including expenses of $850.22) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on October 1, 1999, the Respondents shall pay to the Claimant compensation benefits for his temporary total disability, based upon an average weekly wage of $915.00, such compensation to be computed in accordance with Section 8(e) of the Act.

2. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, commencing on March 18, 1999, subject to the provisions of Section 7 of the Act.

4. The Respondents shall pay to Claimant additional compensation at the rate of ten (10) percent, pursuant to Section 14(e) of the Act, based upon installments due between October 1, 1999 and April 13, 2000.

5. The Respondents shall pay to Claimant's attorney, James W. Case, the sum of $11,736.22 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between April 13, 2000 and February 23, 2001.

6. The Employer shall take a credit for the disability benefits paid to the Claimant by CNA Insurance Companies to prevent double recovery by the Claimant and as Claimant agreed that such benefits would be a lien upon compensation benefits awarded to the Claimant. (CX 19)

A
DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jl